COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts	))))))	**D.T.E. 01-31**

ATTORNEY GENERAL'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

Pursuant to 220 C.M.R. § 1.11(10) and Department of Telecommunications and Energy ("Department") precedent, the Attorney General seeks reconsideration of the Department's May 8, 2002 Order ("Verizon Order"). As grounds for this request, the Attorney General states that on May 24, 2002, the United States Court of Appeals for the District of Colombia issued a decision which essentially eliminated the requirement for incumbent local telephone companies to unbundle all of its network elements. *United States Telecom Association v. FCC*, 00-1012 , May 24, 2002 (slip op.) In addition to this new law which materially impacts the *Verizon Order*, the Department's treatment of certain elements of the competitive market analysis appear to be the result of inadvertence or mistake. The Attorney General requests that the Department reconsider its findings and related standard used to discern the sufficiency of competition for business customers or, in the alternative, order Verizon to use uniform statewide rates for deregulated business services. The Attorney General also seeks reconsideration of the findings that residential rates are "likely below their efficient levels" and that residential rates should be

subject to five percent annual increases.

II. STANDARD OF REVIEW

The Department may grant reconsideration of previously decided issues when extraordinary circumstances dictate that the Department take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. *North Attleboro Gas Company*, D.P.U. 94-130-B, p. 2 (1995); *Boston Edison Company*, D.P.U. 90-270-A, pp. 2-3 (1991). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. *Massachusetts Electric Company*, D.P.U. 90-261-B, at 7 (1991); *New England Telephone and Telegraph Company*, D.P.U. 86-33-J, at 2 (1989); *Boston Edison Company*, D.P.U. 1350-A, at 5 (1983). It is also appropriate where parties have not been "given notice of the issues involved and accorded a reasonable opportunity to prepare and present evidence and argument" on an issue decided by the Department. *Re: Petition of CTC Communications Corp.*, D.T.E. 98-18-A, at 2, 9 (1998).

The Department has stated that a motion for reconsideration "should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered." *Boston Edison Company*, D.P.U. 90-270-A, at 2-3 (1991); *Western Massachusetts Electric Company*, D.P.U. 85-270-C, at 12-13 (1987). It should not attempt to reargue issues considered and decided in the main case. *Commonwealth Electric Company*, D.P.U. 92-3C-1A, at 3-6 (1995); *Boston Edison Company*, D.P.U. 90-270-A, at 3 (1991).

III. BACKGROUND

The Department stated that it would base its findings of sufficient competition in the

Verizon Order on the three-pronged test that it used in *AT&T Alternative Regulation,* D.P.U. 91-79 (1992) ("*AT&T Alternative Regulation*"). Under that test, the Department examines three factors to evaluate the level of competition in local Massachusetts telephone markets: 1) market share, 2) supply elasticity, and 3) demand elasticity. *Verizon Order*, p. 22; *AT&T Alternative Regulation,* pp. 32-34.

Market share has been measured by comparing the number of access lines served at a statewide level and at a wire center level. Exh. AG-1 at 8, Exh. AG-16A, RR DTE-VZ-2. Supply elasticity refers to "the extent to which firms are able to expand or contract their output in response to market price and other market conditions." AG Initial Brief, p. 7; Exh. AG-1 at 8. Demand elasticity has been described as a customer's willingness and/or ability to modify the quantity of a good or service purchased from a given firm in response to a change in that firm's price. *Verizon Order*, p. 80. The analytic underpinning of this standard is that in a truly competitive market, where no entity has market power, telephone rates set by the market satisfy the " just and reasonable" requirements of G.L. c. 159, § 17. *IntraLATA Competition Order*, D.P. U. 1731 (1985).

IV. ARGUMENT

The Department should reconsider its *Verizon Order*. The Order was the result of a mistake and inadvertence in that the Department erred in its findings and analyses regarding its decision that the business segment of the local telephone business market is sufficiently competitive to allow Verizon pricing freedom for those services. Specifically, the Department erred in its:

- "analysis and findings" that the whole state, rather than a wire center or density zone,

constitutes the relevant market to analyze for determination of sufficient competition;

- "analysis and findings" that sufficient evidence supports the finding of moderately high supply elasticity necessary for sufficient competition in the business segment of the local telephone market;

- "analysis and findings" that the CLECs hold a large enough share of the local business segment of the telephone market to meet the Department's market share requirement under its three pronged test in *AT&T Alternative Regulation*;

- "analysis and findings" that sufficient evidence exists to satisfy the three pronged test for sufficient competition in the business segment of the local telephone market; and

- The standard of review used to justify the findings in this case.

Moreover, the Department's *Verizon Order* must now be reviewed in light of a recent appellate decision which appears to greatly reduce the market pressures Verizon may have faced from competitors who lease unbundled network elements ("UNEs") from Verizon. *United States Telecom Association v. Federal Communications Commission*, D.C. Cir. Court App., ___ F.3d ___, No. 00-1012 (decided May 24, 2002).

A. The Department's State-Wide Market Analysis Is Not Supported By The Record

The Department erred in its analysis and findings that the appropriate market to consider when determining the level of competition for local telephone business is the state-wide region, rather than on the local wire centers. The Department's decision allowing pricing flexibility and de-averaging across the state assumes that the service and prices available to business customers in rural Otis are similar to those available to a business customer in Boston. Such an assumption is unfair, unreasonable and not supported by substantial evidence or adequate subsidiary findings. *Massachusetts Institute of Technology v. Department of Public Utilities*, 425 Mass. 856, 684

N.E.2d 585, 593-597 (1997).[1]

The record establishes that across the state, the differences in market share and the presence of competition vary dramatically among wire centers and density zones. The evidence showed that over fifty percent of the wire centers in the state have a competitive market share of 20 percent or less. This actual market share level does not meet any criteria for sufficiently competitive. *See AT&T Alternative Regulation*, (58% AT&T market share was not sufficient to support finding of non-dominant carrier). The record, therefore, does not support the conclusion that these wire centers are competitive. By looking state-wide, the Department's analysis combines the competitive wire centers with these centers of insufficient competition to determine an average. The Department disregards the fact that different wire centers serve different density zones and that suppliers consider wire centers separately when determining where to provide their services. Without some price controls by the Department, there will be no check on efforts by Verizon overcharge customers for local telephone services in those wire centers without sufficient competition.

Moreover, theoretical competition is not actual competition. The Department cannot not base its findings on unsupported claims. *MIT v. DPU*, 684 N.E. 2d 585, 595-596. The fact that UNEs and resellers are available state-wide does not relieve the Department of its obligation to determine whether there is sufficient actual competition to ensure just and reasonable rates for unserved wire centers. The fact that a competitor has the legal ability to compete does not mean

[1] "G.L. c. 30A, § 11(8), requires the decision of the department to 'be accompanied by a statement of reasons ... including determination of each issue of fact or law necessary to the decision ... There is thus a 'duty to make adequate subsidiary findings.' ... Without an adequate statement of reasons, 'we are unable to determine whether an appellant has met his burden of proof that a decision of the department is improper.' " *MIT v. DPU*, 425 Mass. 856, 868-869.

that they will in fact appear some time in the future to provide reasonably priced service to offset Verizon's monopoly position in these lesser served areas of the state. The Department erred in not adjusting its findings for those customers served by wire centers with little or no presence of competitors.

At a minimum, the Department should deny Verizon the ability to geographically de-average its business rates. *See* Attorney General Reply Brief, pp. 8-9. The business rate should remain the same no matter where the consumer lives in the state. If one state-wide rate is charged, those customers outside the Route 128 area, where there is less competition as a check on high Verizon prices, will benefit from lower market based rates charged to customers inside Route 128. *Id.* The benefits of competition will flow to all customers, not just to those in the few wire centers where competition arguably exists. Therefore, the Department should reconsider its decision to use a state-wide analysis as the basis for its determination of the level of competition and use a wire center analysis instead.

B. The Department Should Reconsider Its Analysis And Findings That The Supply Elasticity For CLECs For The Local Telephone Market Is Moderately High

The Department should reconsider its findings and analysis that the supply elasticity for competitive local exchange carriers ("CLECs") is high. The Department found a low supply elasticity of facilities-based providers. On the other hand, the Department determined a high supply elasticity of UNE-based and reseller-based providers, an assumed that the threat of competition would cause Verizon to keep its rates for business services at a "just and reasonable"

level.[2] However, the Department's reasoning is not supported by the record.

First, the Department assumed, with no record evidence, that the threat of competition from UNE-based providers and resellers is the same as and is as effective as real competition. Second, with no supporting evidence, the Department concluded that UNE-based providers and resellers will uniformly provide service across the state in reaction to Verizon price changes. In many of the wire centers across the state, CLECs provide less than 10 percent of the service, so it is an error to conclude that they will and can respond to Verizon actions. Third, the Department assumed, with no record evidence, that resellers will be able to respond in the future, given Verizon's proposal to drastically reduce the resale margin in docket D.T.E. 01-20. These three critical assumptions of the Department's finding of high elasticity of supply were not based on sufficient record evidence. *Boston Gas Company v. Department of Telecommunications and Energy*, _ Mass._, Westlaw 2002 ___, slip op. 08538 (March 7, 2002); *MIT v. DPU*, 684 N.E. 2d 585, 593-597.

C. The Department Should Reconsider Its Finding That CLECs' Market Share Is High Enough To Support A Finding Of Sufficient Competition

The Department should reconsider its finding that CLECs held enough market share to support a finding of sufficient competition. Such a finding is inconsistent with prior precedent and without support. *Boston Gas Company v. Department of Public Utilities*, 367 Mass. 92, 104

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[2] The D.C. Circuit's recent order appears to undercut this assumption by requiring the FCC or the Department to conduct a "genuine impairment" test before requiring Verizon to provide UNEs: "... to the extent that the Commission orders access to UNEs in circumstances where there is little or no reason to think that its absence will genuinely impair competition that might otherwise occur, we believe it must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible." *USTA v. FCC*, No. 00-1012, 2002 Westlaw ___, slip op. at 12 (D.C. Cir. May 24, 2002).

(1975) (parties to a proceeding are entitled to reasoned consistency in Department decisions).[3]

Although the Department has stated that there is no "bright line" measure for the market share test, in this case the Department adopted a "moving line" that does not comport with prior decisions. In *AT&T Alternative Regulation*, the Department found that AT&T's 58 percent share was insufficient proof to support a finding of non-dominant carrier or that AT&T had sufficient competition. Here, in contrast, the Department found that Verizon's 67 percent control of the market was evidence to support a finding of sufficient competition. Although the Department may not want to define a "bright line," clearly moving the line from 58 percent to 67 percent without explanation is inconsistent with the doctrine of reasoned consistency. The Department must find any facts sufficient to warrant a change in position from that set forth in *AT&T Alternative Regulation*. An "unexplained deviation" from prior decisions is not permitted.[4]

D. The Department Failed To Provide To Support Its Finding That Verizon Met Its Test For Sufficient Competition

In its June 21, 2001 Scoping Order, the Department stated that it would base any findings

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[3] A party's right to expect and obtain "reasoned consistency" in the agency's decisions. This "does not mean that every decision of the Department in a particular proceeding becomes irreversible in the manner of judicial decisions constituting res judicata. . . ." *Boston Gas Company v. Department of Public Utilities*, 367 Mass. at 104. What is prohibited is "the same issue arising as to the same party [being] subject to decision according to the whim or caprice of the Department every time it is presented." *Id*. It is "unexplained deviation" from prior decisions that is not permitted. *Id*. at 104-105. "[T]he requirement of "reasoned consistency" in *Boston Gas Co.*, *supra*, means that any change from an established pattern of conduct must be explained." *Robinson v. Department of Public Utilities*, 416 Mass. 668, 673 (1993). "It does not mean that the DPU may never deviate from its original position." *Id*. In the *Boston Gas* case, it was the Department's failure to find any facts sufficient to warrant a change in position that was objectionable, and not the change in position itself. *Monsanto Company v. Department of Public Utilities*, 402 Mass. 564, 569 n. 7 (1988). In *Monsanto*, the Court reiterated that the Department could change its position if the record contains substantial evidence for the finding. *Id*. at 569-570.

[4] See note 3, *supra*.

of sufficient competition in this case on the three-pronged test set forth in *AT&T Alternative Regulation*. In conducting this analysis, the Department examined the three factors set forth in *AT&T Alternative Regulation*: 1) market share, 2) supply elasticity, and 3) demand elasticity. *AT&T Alternative Regulation* at 32-34.

According to the Department, there is moderately high supply elasticity across the state, and therefore, Verizon passed the first part of the three part test.[5] The Department, however, found that the demand elasticity was low. *Verizon Order*, pp. 87-88. Therefore, logically, demand elasticity should have failed the test. The Department also found that the market share of Verizon was above that which it found as proof of competition in *AT&T Alternative Regulation*. Once again Verizon fails the test.

The Department's findings of sufficient competition is not supported by the record because Verizon has failed two out of three elements that the Department set forth as the standard to determine sufficient competition. The Department has apparently rejected the three pronged test set forth in the Scoping Order and instead adopted a new test based only on supply elasticity, materially changing the *AT&T Alternative Regulation* standard on which it stated it would base its decision. By changing the standard of review, the Department has denied the parties due process of law. G.L. c. 30A § 11. (Parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument.)

[5] The Attorney General is seeking reconsideration of the Department's decision that there is moderately high supply elasticity as is discussed. See Section B.

E. The Department's Conclusions Regarding The Current Level Of Residential Rates Are Inappropriate, Beyond The Scope Of The Hearing And Not Supported By The Record Evidence

The Department's "tentative conclusions" regarding the current level of residential rates are inappropriate, beyond the scope of the Phase I hearing and not supported by the record evidence. The Department stated that "the first phase of this proceeding will be an evaluation of whether or not there is sufficient competition . . . ." Scoping Order, p. 18. There is no notice that the price sufficiency of residential rates, or for that matter any issue related to residential rates was a proper subject for Phase I. The Company's financial condition and projected costs were beyond the scope of this case and would be considered, if at all, in other proceedings, including Phase II of this case. *Id*. The Department did not consider argument or allow evidence regarding these matters. The Department's findings, even if "tentative," regarding the reasonableness of the current rates and the proposed annual five percent increase are inappropriate and wholly unsupported by the record.[6]

Findings on the reasonableness of residential rates are inappropriate. Due process requires that the Department give notice to the parties of the issues that are to be considered during the proceeding. *Southbridge Water Supply Company v. Department of Public Utilities*, 368 Mass. 300, 308-309 (1975) (parties are entitled to notice and a fair hearing). Here, the Department specifically rejected the submission of evidence and arguments regarding these issues. Scoping Order, p. 18. Furthermore, the Department must base its decision on the evidence and findings from the record, both of which were absent in this case. *MIT v. DPU*, 684

[6] It is not clear from the Verizon Order what the Department means by a "tentative" finding, and there is no provision for such a determination in the Administrative Procedures Act.

N.E.2d 585, 593-597. Therefore, the Department should reconsider its decision that the Company's residential local telephone service rates are currently below the cost of providing that service, and that those rates may be increased by five percent per year.

F. The Department Should Reconsider Its Analysis and Findings Regarding Supplier Market Share, Supplier Elasticity, and A "Sufficiently Competitive" Market For The Business Segment Of Local Telephone Services Due To The Recent U.S. Court Of Appeals Decision On Unbundling Of Network Elements

The Department should reconsider its analysis and findings regarding the supplier market share, elasticity of supply, and a "sufficiently competitive" market for the business segment of local telephone services in light of new evidence that should cause it to take a fresh look at it analysis and findings. *Boston Edison Company*, D.P.U. 90-270-A, at 2-3 (1991); *Western Massachusetts Electric Company*, D.P.U. 85-270-C, at 12-13 (1987). Specifically, on May 24, 2002, a decision by the United States Court of Appeals for the District of Columbia Circuit in *United States Telecom, et al., v. Federal Communication Commission and United States of America*, No. 00-1015, reversed the FCC's longstanding requirement that Incumbent Local Telephone Companies unbundle their networks and offer for lease the different elements of the networks to CLECs. The Court's decision will essentially eliminate all UNE supplied competitors to Verizon, thus dramatically decreasing supply elasticity, dramatically decreasing competitors' market share, and further reducing the basis for Department's findings of a "sufficiently competitive" market.[7] Therefore, in light of this new information, the Department

[7] This decision will leave business customers in many parts of the state outside the Boston metro area with only one type of supplier – the reseller – to provide them service. The elimination of UNE suppliers along with the declining reseller discount will cause a decrease in customer choice and increase market power for Verizon.

should reconsider its analysis and findings of a "sufficiently competitive" market for the business segment of local telephone services and take a fresh look at its analysis and findings. *Boston Edison Company*, D.P.U. 90-270-A, at 2-3 (1991); *Western Massachusetts Electric Company*, D.P.U. 85-270-C, at 12-13 (1987).

IV. CONCLUSION

For these reasons, the Attorney General requests that the Department reconsider its findings and related standard used to evaluate the sufficiency of competition for business customers or, in the alternative, order Verizon to use uniform statewide rates for deregulated business services. The Attorney General also seeks reconsideration of the findings that residential rates are "likely below their efficient levels" and that residential rates should be subject to five percent annual increases, and for such further relief as is proper.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by e-mail and either hand-delivery or U.S. mail.

Dated at Boston this 28th day of May 2002.

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